TUESDAY MORNING
JULY 29, 2008

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of $5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a "paralegal" at a wage of $250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale's involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale $1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

Question 2

To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security ("the Secretary") to issue "National Security Requests," which would require businesses to produce the personal and financial records of their customers to the Federal Bureau of Investigation ("the FBI") without a warrant. Congress rejected the proposal.

Thereafter, in response, the President issued Executive Order 999 ("the Order"). The Order authorizes the Secretary to issue "National Security Requests," which require businesses to produce the personal and financial records of their customers to the FBI without a warrant. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the "Terrorism Prevention Act" ("the Act"), requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to the State X Department of Justice.

1. Is the Order within the President's authority under the United States Constitution? Discuss.

2. Assuming the Order is within the President's authority, does the Order preempt the Act? Discuss.

3. Assuming the Order is within the President's authority and does not preempt the Act, do the Order and the Act violate the Fourth Amendment to the United States Constitution on their face? Discuss.

Question 3

On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates of $4,000, consisting of $2,500 for labor and $1,500 for materials for a cedar fence, and of $7,000, consisting of $2,500 for labor and $4,500 for materials for a redwood fence. He said, however, that he would have to verify that the redwood was available.

Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she said she wanted the fence completed by June 1 because she was planning an important event in her back yard for a local charity. Builder said he would check with redwood suppliers and get back to her within two days.

On May 2, Builder telephoned Owner. Owner's phone was answered by her voice-message machine, which informed callers that she had been called away until about May 25 but would be checking her messages daily and would return calls as soon as she could. Builder left a message stating, "I've found the redwood, and I can build the redwood fence for $7,000, as we agreed. Please give me a call, as I will otherwise buy the redwood, which is in short supply, and start the work within a few days." Owner heard the message, but because the charity event she had planned had been cancelled and there was no longer any urgency about getting the fence erected, she decided to wait until she returned to speak to Builder.

By May 14, Builder had still not heard from Owner. He was concerned that the supply of redwood might not hold and that if he did not start work immediately he would not be able to finish by June 1. Thus, he bought the redwood and completed construction of the fence on May 24.

When Owner returned on May 25, she saw the completed fence and sent Builder a letter stating, "You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn't decided on redwood. Besides, the charity event that I had planned got cancelled. You should have waited until I got back. But, to avoid a dispute with you, I'll offer to split the difference – I'll pay you $5,500."

Builder received the letter on May 26. He telephoned Owner and said, "When I first read your letter, I was going to get a lawyer and sue you, but I decided to let it go and I do accept your offer of $5,500." Owner replied, "Well, you're too late. I've changed my mind. I don't think I owe you anything."

May Builder recover all or any part of $7,000 from Owner on a contractual or other basis? Discuss.

TUESDAY AFTERNOON
JULY 29, 2008

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

PEARSON v. SAVINGS GALORE

FILE

PEARSON v. SAVINGS GALORE

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

HAMLINE & BUTTRAM, LLP

Santa Claritan, Columbia

MEMORANDUM

To: Applicant

From: Mary Hamline

Date: July 29, 2008

Re: **Chris Pearson v. Savings Galore**

Our client, Chris Pearson ("Pearson"), was held for about an hour by the Savings Galore supermarket because his buddy, with whom he shopped, was suspected of shoplifting and took off when confronted. I've checked out the criminal aspect, and Pearson did not commit any illegal acts.

Please write a memorandum that evaluates his possible civil claim against Savings Galore. Your memorandum should do the following:

1. Explain the elements that must be proven in order for Pearson to succeed on a false imprisonment claim.
2. Apply the facts of Pearson's situation to the elements and assess the likelihood that Pearson would prevail on the merits of the claim.
3. Identify the injuries incurred by Pearson that would be compensable given these facts and assess the likelihood that punitive damages would be awarded given these facts.
4. Identify any defenses the store may raise, and explain and assess the likelihood that the store would prevail on each defense.

TRANSCRIPT OF JULY 24, 2008 INTERVIEW WITH CHRIS PEARSON

Mary Hamline (Q): The tape recorder is running now. As I said, the reason why I like to record initial interviews is that it will give me an accurate record of what you say, and I will be able to listen and use it later on.

Chris Pearson (A): Okay.

Q: I understand that you got into some sort of a dispute with a store, and that you might want to sue them, but that's about it.

A: Well, I live with about 5 other people in a rented house over near the campus.

Q: Okay. Are you a student at the University of Columbia?

A: Yes, I'm a student, a biosciences major. I'm going to finish up pretty soon. I'm 22 years old, single, and pretty much impoverished. Well, one of my roommates and I went to do the weekly food shopping for the whole house.

Q: Went where?

A: Right. We went down to that combined warehouse store and market, you know, that huge thing down on the corner of Euclid and Sligo?

Q: Do you mean Savings Galore?

A: Yes, that's the name of it. We almost always go there to do the shopping unless we can get a car, and then we go somewhere better.

Q: What was your roommate's name, the one who went with you?

A: Do I have to tell you that?

Q: It is always possible that we might need to talk to this person or even get him to testify, depending on what is going on. But for now, just use a first name at least, just so you can tell the story.

A: Okay. My roommate is named Jeff.

Q: Is he a student at the University of Columbia too?

A: No. He finished up about a year ago.

Q: Why don't you just tell me what happened when you and Jeff went shopping?

A: Well, we started to do the shopping, putting some stuff in the cart. We would split up to go get things; we had a list, but then we would come back to the cart and talk and look for other stuff, too. After we had been there for about 20 minutes, I thought I saw

Jeff open up a can of cashews and eat them while we were shopping. But I didn't pay too much attention to it.

Q: How long did it take you to shop?

A: About an hour. There was a long wait at the check-out stand, and we finally got up to the front and paid and headed out of the store. We were both kind of loaded down - I was carrying about 6 bags of groceries, and Jeff had about 4 bags.

Q: How were you carrying so many bags?

A: If you get your hand through the handle of those plastic bags, you can hold a whole bunch - I had three in each hand - well balanced.

Q: I'll have to try that some time. Had you paid for the cashews?

A: At that point, I didn't really notice. I didn't think we had, but there was quite a wait at the check-out stand and I had forgotten about it, to tell you the truth.

Q: How long ago was this?

A: About 2 months ago.

Q: What happened next?

A: We were walking out of the parking area and towards the street back to our house, when a big, strong-looking woman came walking right up to us. She yelled, "Hold it right there!" And I remember thinking "Who is this lady?" She got right next to us and grabbed me and said, "I saw you take those cashews and you didn't pay for them." I said, "I didn't take any cashews." She said, "That's right, you didn't; it was this guy, right here." And she grabbed hold of Jeff's arm. Jeff said something like: "Oh yeah, I forgot to pay for them; here, let me pay for them right now." And the lady said: "No, it was deliberate; I'm going to have to take you in."

Q: Interesting. Did you both go back to the store?

A: No. As soon as that woman said "I'm going to have to take you in" - and you could just tell she was trouble and meant it from the tone in her voice and her look - Jeff dropped his bags of groceries, shook himself off from her hold, and took off around the corner of the store. There is a wetlands area around the back.

Q: But you didn't go with him?

A: No. He split, and I was left holding the bags. I just stood there with my mouth open.

There I was with a couple of hundred dollars worth of groceries, that detective, and no Jeff.

Q: Did she identify herself as a detective?

A: Not until later. She just gave me a glare and said, “You come with me.” I said, “I didn’t do anything,” but she said, “I don’t care. You come with me right now. You and your fast friend are in big trouble.”

Q: Did you think at all about running yourself?

A: Not really. She looked like a big, strong football player, and I was holding a lot of stuff.

Q: Did she grab you or force you into the store?

A: Not exactly. She picked up the bags Jeff had dropped and got sort of in back and sort of to the side of me and herded me in, kind of like a dog herding sheep.

Q: What would have happened if you had tried to just walk away at that point?

A: I don't know for sure, but it didn't seem like an option to me. She would probably have tackled me.

Q: So did you go on your own?

A: I sure wouldn't say that. I went along, but I didn't see what else I could do.

Q: What happened when you got into the store?

A: We went into an office and she tossed the bags down, and I put the ones I was carrying down, and I said something like “Why don’t you leave me alone? I didn’t take any cashews and you know it.” She took me to another office, way in the back, one with no windows. I had no idea they had rooms like that in those buildings. We sat down in there and she called someone on the phone and after a few minutes two very large men, who looked like they were former boxers, came in. They left me in there for a while with the door locked and I could hear her talking to them right outside the door.

Q: How do you know the door was locked? Did you try to get out?

A: Well, no. It sounded like they locked the door. I wasn’t about to try to take off. I was pretty scared, actually. I get anxious sometimes, and I was having some trouble breathing and my heart was pounding, so I just sat there and tried to take some deep breaths. Then all three of them came back in. The woman told me she was the house detective, and the two guys were security staff, and that they just wanted to talk to me.

They said, “Let’s see some identification.” I told them, “You have no right to do this.” But I showed them my student registration card, partly because I figured it was better if they knew who I was and that I was a student at the University, and partly because I didn’t really see any choice. I didn't give them my address.

Q: Did you think they were going to rough you up?

A: Actually, no, even though Jeff and I look like young punks and they looked like professional wrestlers. I thought they were going to try to intimidate me somehow, and I didn’t think they were going to let me go for maybe a long time, but they didn’t say they were going to beat me up, either.

Q: Okay. What did they say to you?

A: They said: “Because you are a college kid, you must be pretty smart. Is your friend a college student too? He was pretty dumb to run.” I didn’t want to say anything about Jeff, so I tried not to look at them, and that kind of angered them. The lady said: “Your friend isn’t much of a friend - he took off and left you to take the rap. We’ve got you. But if you give us his name and address, we’ll let you go.” I was pretty scared about that. I was mad at Jeff, because he is always pulling stuff like that.

Q: What do you mean, stuff like that? Has he ever been caught shoplifting before?

A: No. But he is such a clueless idiot. He actually is kind of a slacker. You know, he opens up food in stores, forgets to pay for it, and I think he steals stuff from time to time. But he’s never been caught.

Q: What did you do when they asked you for his name?

A: They kept saying, “Give us his name and address and we’ll let you go.” And I was mad at him, especially for taking off and leaving me with all of this trouble but I wasn’t about to give them his name. So I kept saying: “You have no right to keep me here. I have not done anything illegal. Let me go immediately.” And they kept saying stuff like: “Hey, figure it out; we don’t have to let you go, but we will if you give us his name and address.” And I just kept saying the same thing: “You have no right to keep me here. I have not done anything illegal. Let me go immediately.” Sort of like a mantra. I just kept repeating that and trying not to make eye contact. I didn’t want to antagonize them.

Q: Did you think you were actually right about their having no right to hold you?

A: I didn't think they were going to let me go, but I didn't think they could prove I did anything illegal, because I hadn't. So I didn't know. I was trying not to be anxious.

Q: They must have eventually let you go?

A: Yeah. This went around and around, and they'd come ask, all three, and then they would leave for a while, and then come back and try again, and I'd say the same thing. I never tried to just walk out of there, but I thought if I did they would just grab me and put me back there, or arrest me, so I just waited. After I had been there quite a while, I'm guessing about an hour, I was starting to get worried, because the only person who knew I was there was Jeff, and he obviously wasn't going to get me out, and then they came in with a piece of paper and said, "Here, if you sign this, we'll let you go." I signed it and they let me go. I don't know what happened to the groceries; I didn't even think about them until much later.

Q: What did the piece of paper say?

A: Here. This is the copy of what they gave me. But I didn't read it too closely. I probably would have signed it no matter what it said. At the time, I just wanted to get out of there.

Q: Can I keep this?

A: Sure.

Q: Did they ever find out who Jeff was and have him arrested?

A: No, they never did. He was amazed I didn't tell. He was going around the house looking for anything the police would be interested in when I showed up. He also told me he had stuck a pair of garden gloves in his pants, which was one reason why he had taken off, as it was more than just the cashews.

Q: Am I right that they never physically harmed you, and never did arrest you or even really make a move to arrest you?

A: In thinking back on it, I'm not sure they ever actually touched me other than when the detective first put her hands on me in the parking lot. They never did strike or hit me, or arrest me. So maybe I should just leave it alone.

Q: Well, you can always just leave things where they are. But it sounds like you want to at least consider your options?

A: Yes. I'm kind of mad because of what they did, so I'm interested in knowing, I guess, if I can sue that store. I haven't really been able to sleep at all since then. If I do get to sleep I have nightmares about being locked away in little places. I've been to a psychiatrist quite a few times since this happened, and I don't have any health insurance, and that actually has been expensive. We all lost the money from the food. Who knows what they did with it? Although I guess that was sort of Jeff's fault for just dropping those bags, and mine for not remembering them. But I don't think they should be allowed to get away with that, when I didn't do anything except go shopping with a screw-up. I could have had a panic attack or heart failure in there. I was really scared and I'm not sure they had any right to do that to me. So I guess I think someone should call them on that, and not let them get away with it. And it sure can't be Jeff.

Q: Would it be okay with you if I talked with your psychiatrist briefly about how you are feeling and what treatment is necessary? It would be helpful if your doctor could verify your condition.

A: That's okay.

Q: What is his name, and if you have it, his phone number?

A: His name is Dr. Romeo. I don't have his phone number with me right now, but we could look it up in the phone book. That's what I do when I want to change an appointment.

Q: That's okay; we'll look it up. How do you spell it, like the Shakespeare character?

A: R-o-m-e-o. So do you think I should sue the store? Or is it not worth it?

Q: I'd like to have someone do a little research so we will know for sure what we are dealing with before we give you advice. Why don't you set up a meeting with my secretary and . . .my secretary is the guy sitting over in the other office. There isn't a real hurry on this. Can you come back in a week?

A: Sure.

END OF TRANSCRIPT

SAVINGS GALORE, INC.

SUSPECTED SHOPLIFTER RELEASE FORM

YOU HAVE THE RIGHT TO REMAIN SILENT. RATHER THAN SPEAK WITH US, YOU MAY FIRST CONSULT WITH AN ATTORNEY.

NOTICE: THIS IS A LEGALLY BINDING AGREEMENT. By signing this agreement, you waive your right to bring a court action to recover compensation or obtain remedy against Savings Galore, Inc.

WAIVER/RELEASE/COVENANT NOT TO SUE

In consideration for Savings Galore, Inc. releasing me from their custody, and in consideration for Savings Galore, Inc. not filing criminal charges against me or seeking civil liability against me, I hereby release Savings Galore, Inc., a Columbia corporation, and its officers, agents, and employees from and WAIVE MY SUBSTANTIAL RIGHTS TO ASSERT any cause of action, claims or demands of any nature whatsoever, including but not limited to a claim of false imprisonment, false arrest, intentional infliction of emotional distress, duress, or negligence which I, my heirs, representatives, executors, administrators and assigns may now have, or have in the future against Savings Galore, Inc. on account of the store detaining me on 5/29/2008 for purposes of investigation of shoplifting. I further agree that Savings Galore, Inc. had reasonable cause to detain me because they suspected me of shoplifting and that they did not detain me for longer than a reasonable period of time. I understand that the terms of this agreement are legally binding and I certify that I am signing this agreement, after having carefully read it, of my own free will.

Chris Pearson 5/29/2008 — JohnDeMaio

Signature and Date — Witness

Chris Pearson — Kent Wong

Printed Name — Witness

HAMLINE & BUTTRAM, LLP

Santa Claritan, Columbia

MEMORANDUM

To: Chris Pearson Client File
From: Mary Hamline
Date: July 24, 2008
Re: **Phone conversation with Dr. Fred Romeo, a psychiatrist treating Chris Pearson**

On July 24, 2008 I called Dr. Fred Romeo, phone # 555-3882, 550 Bootwide Ave., Santa Claritan, Columbia. Dr. Romeo is a psychiatrist who has been treating our client Chris Pearson. He has been a practicing psychiatrist for over 10 years. I explained that Pearson was our client, and that Pearson had authorized Dr. Romeo to discuss his current condition with me as a privileged communication. Romeo said that Pearson had told him I might call, so he wasn't surprised by it. We then had a conversation concerning whether Pearson had suffered emotional injuries due to the episode at Savings Galore, the nature of the suffering, and whether Romeo would be willing to sign an affidavit and/or testify if Pearson asked him to.

Dr. Romeo said he knows and remembers Pearson quite well, but he also went and retrieved and reviewed his notes. He said that Pearson had been to see him a couple of times before the episode at Savings Galore, so he had a chance to compare, but only a little. Dr. Romeo said he concluded that Pearson was currently suffering from significantly lower than usual energy and low motivation, as well as sleep disorder, loss of concentration, tearfulness, and loss of general

interest in previously pleasurable activities. He said these symptoms were all quite consistent with posttraumatic stress disorder, and predicted that they may persist, on and off, for as long as a year, and might return. He also said, however, that he had seen a lot worse cases of posttraumatic stress disorder, although Pearson does seem to be suffering.

I asked him if he was reasonably confident that the posttraumatic stress suffered by Pearson was brought about by the episode at Savings Galore. Dr. Romeo said yes. He said Pearson hadn't mentioned the episode extensively, but that his current condition was connected to a traumatic event. I asked if Pearson's symptoms could be triggered even though there was not any physical injury associated with the event. Dr. Romeo said, "Oh, sure. Posttraumatic stress is often created by a stressful event that turns out not to cause physical injury. It is the fear and lack of control over the situation that create the conditions for posttraumatic stress in a lot of cases."

Dr. Romeo said he has never testified in a court setting, but has had his deposition taken several times. He would be happy to sign an affidavit concerning Pearson's condition, and he would be willing to testify if necessary, although he'd like to avoid it. I thanked him and said that it was probable that we would get back to him on this, although that decision in the end was up to Pearson.

TUESDAY AFTERNOON
JULY 29, 2008

California
Bar
Examination

Performance Test A
LIBRARY

PEARSON v. SAVINGS GALORE

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA PENAL CODE

§13-1 Shoplifting; detaining suspect; defense to wrongful detention

A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, such person knowingly obtains such goods of another with the intent to deprive that person of such goods by:

1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price; or
2. Charging the purchase price of the goods to a fictitious person or any person without that person's authority; or
3. Paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price tag or marking; or
4. Transferring the goods from one container to another; or
5. Concealment.

B. Any person who knowingly conceals upon himself or another person unpurchased merchandise of any mercantile establishment while within the mercantile establishment shall be presumed to have the necessary culpable mental state pursuant to subsection A of this section.

C. A merchant, or a merchant's agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person suspected of shoplifting as defined in subsection A of this section for questioning or summoning a law enforcement officer.

D. Reasonable cause is a defense to a civil or criminal action against a peace officer, a merchant or an agent or employee of such merchant for false arrest, false or unlawful imprisonment, or wrongful detention.

Alice James v. Smitty's

Columbia Court of Appeal (1998)

Alice James ("James"), her son Steven James ("Steven"), and her friend Nancy Robertson ("Robertson") were shopping at Smitty's, a supermarket chain store. James placed a pair of children's sandals in her shopping cart and covered them with an advertising flier. James later said she: (1) placed the sandals in the cart to quiet Steven, who wanted them; (2) covered them to make Steven forget them, planning to return them; and then (3) forgot them herself. Robertson later said she was only vaguely aware that James had placed the sandals in the cart and was entirely unaware that James had placed the flier over the sandals.

Karen Wilkerson, a Smitty's security officer, observed James's actions on a surveillance monitor and followed James and Robertson to the check-out stand. Though James paid for other items, she did not pay for the sandals, which remained in the bottom of her cart.

James and Robertson left the store. Robertson waited outside the car while James placed the groceries and her purse inside the car and then lifted Steven from the cart. She then picked up the sandals. She later said she had just discovered them and was about to return them to the store. At that moment, Wilkerson approached, identified herself as a Smitty's security officer, pointed to the sandals, and motioned James and Robertson back into the store. James, who is very hard of hearing, originally did not understand what Wilkerson said. She first thought Wilkerson wanted the advertising flier. When Wilkerson pointed at her purse, James thought Wilkerson was trying to rob her. When Wilkerson pulled at her purse and pointed at the sandals, James understood that Wilkerson thought she had stolen the sandals and, accompanied by Robertson and Steven, followed Wilkerson to the security offices inside the store.

Wilkerson directed Robertson to remain in one small office. (There is conflicting evidence concerning whether the door to Robertson's office was locked, but that fact is not relevant to the issues in this appeal.) Wilkerson then escorted James and Steven to a separate office. Wilkerson searched James's purse, photographed her against her will, showed her part of the surveillance video, and presented a form letter demanding payment of a statutory civil penalty plus the sandals' purchase price. James, increasingly distraught, wrote her phone number on the form letter, hoping Wilkerson would call her husband. Wilkerson did not perceive a hearing problem and did not call the number that James had written. James (and Robertson, who claimed she could hear through the wall) claimed that Wilkerson was abusive, yelling and slamming objects. After about 45 minutes in the office, James hyperventilated and lost consciousness. Wilkerson and the night manager called for paramedic assistance. Wilkerson testified that she took Steven from the security office when the paramedics arrived to attend to James and that Robertson and one of the paramedics took Steven to the parking lot to see a fire engine. The paramedics took James to the hospital. Robertson called James's husband, who came to pick up Steven and went to the hospital where the paramedics had taken his wife.

James and Steven sued Smitty's for negligence and false imprisonment. The jury awarded James $8,500 in damages on her false imprisonment claim and awarded Steven $12,500 on his false imprisonment and negligent infliction of emotional distress claims. From judgment on the verdict and the denial of its posttrial motions, Smitty's appeals. These appeals concern the finding of liability and award to Steven.

At the close of Plaintiffs' evidence, Smitty's moved for a directed verdict on Steven’s negligent infliction of emotional distress claim, arguing that Plaintiffs neither alleged nor presented evidence of compensable harm. Smitty's claims that the trial court was required to grant their motion for a directed verdict against Steven because there was no evidence offered that Steven suffered physical

injury. His damages were transitory nightmares and sleep disturbance, for about two months, which subsided without medical treatment. Under these facts, this motion should have been granted.

In Columbia, a plaintiff may not recover for negligent infliction of emotional distress unless the shock or mental anguish is accompanied by or manifested as a physical injury. Transitory physical phenomena such as nightmares and sleep disturbance are not the type of bodily harm that would sustain a cause of action for emotional distress. In contrast to a negligence claim, however, a false imprisonment claim does not require proof of physical injury to go forward. Steven's false imprisonment claim is therefore not impeded by the absence of physical damages. Consequently, the injuries suffered by Steven are sufficient injuries to justify an award under a false imprisonment claim.

Smitty's, however, alleges errors concerning Steven's false imprisonment claim. It claims that the trial court should have directed a verdict because Smitty's neither accused nor suspected Steven of shoplifting. We disagree.

Smitty's intended to confine James with the necessary consequence of also confining Steven, her four-year-old child. Its liability to Steven under these circumstances is explained in the Restatement (Second) of Torts. According to Restatement §35, an actor is subject to liability for false imprisonment for the wrongful confinement of another if "he acts intending to confine the other or a third person within boundaries fixed by the actor. . .his act directly or indirectly results in such a confinement of the other, [and] the other is conscious of the confinement or is harmed by it." If a confinement of one party imposes confinement on another party, "the actor is subject to liability to such other as fully as though it were intended so to affect him."

These provisions are dispositive of Smitty's first argument. That Steven was merely an indirect, not the direct, target of confinement does not relieve Smitty's of liability

on Steven's false imprisonment claim. Steven is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, he is entitled to damages for mental suffering, humiliation, and the like. The damages that flow foreseeably from a false confinement of a caretaker flow equally foreseeably to an accompanying small child.

Smitty's also argues that Steven's false imprisonment case should have been dismissed due to the statutorily granted shopkeeper immunity for detaining suspected shoplifters. A merchant may detain a suspected shoplifter without incurring liability if the storekeeper has reasonable cause to believe that the person shoplifted and if the detention is performed in a reasonable manner and for a reasonable length of time. Columbia Penal Code §13-1 C and D. Reasonable cause for the shopkeeper to detain a suspected shoplifter is not dependent on guilt or innocence of the person detained, or whether a crime was actually committed. If the facts and reasonable inferences therefrom are not subject to material dispute, reasonable cause is a question of law to be determined by the court.

Smitty's argues that it had reasonable cause to detain James, and thus it had reasonable cause to detain Steven as well. While we agree that ordinarily reasonable cause to detain a parent suspected of shoplifting gives the merchant reasonable cause to detain minor children of the suspected parent, given the facts of this case we do not agree that Smitty's had reasonable cause to detain Steven.

We have previously indicated our acceptance of Restatement §35, which explains the potential linkage of false imprisonment of a suspect and another. Had Smitty's detained James without reasonable cause, it would have detained Steven without reasonable cause as well. But Smitty's had reasonable cause to detain James, because she picked up the sandals, placed them in the cart, covered them with an advertising flier, and left the store without paying for them. This may have been

inadvertent; it may have been deliberate; but the appearance was such that it gave Smitty's reasonable cause for suspicion of shoplifting.[1]

But the real question is whether Smitty's needed to detain Steven, a person not suspected of shoplifting, for as long as they did under these circumstances. We conclude that it was not reasonable under the circumstances for Smitty's to detain Steven for more than the time necessary to make sure Steven would be under proper supervision.

Smitty's had several alternatives available for Steven's supervision other than detaining him. Most notably, Wilkerson could have immediately asked Robertson to care for Steven while James was detained for investigation of shoplifting, yet she made no effort to do so and in fact impermissibly detained Robertson as well as James and Steven. There was no reasonable cause to detain Robertson. Wilkerson had no basis to believe Robertson had shoplifted or assisted in the shoplifting in any way, and Wilkerson testified that she did not consider Robertson to have been involved in any illegal activity. A merchant does not have immunity to detain a companion of a suspected shoplifter unless the store has reasonable cause to believe the companion was involved in the illegal activity. Because Smitty's did not have that reasonable cause, Robertson was a fully viable alternative for the supervision of Steven. If in fact James had not wished Robertson to supervise Steven, Smitty's would have grounds for avoiding liability for false imprisonment of Steven. Smitty's took all of that opportunity away by simply detaining James, Steven, and Robertson. In addition, they could have had Steven come into the store, asked James to call an acceptable supervisor for Steven, and detained Steven only until the acceptable supervisor arrived.

Accordingly, Smitty's was not by statute granted immunity from liability on Steven's suit for false imprisonment.

[1] Because no fact-finder could reasonably conclude otherwise, the trial court could have directed a verdict for Smitty's on the issue of reasonable cause to detain James.

Affirmed.

Gaspard v. American Telco

Columbia Court of Appeal (2001)

Tracey Gaspard sued her former employer, American Telco, for retaliatory discharge after she filed a workers' compensation claim. The trial court granted summary judgment to her employer on the basis that Gaspard had signed a release of all claims against it. Gaspard appeals, contending that the release was ambiguous and procured by duress, and thus the trial court erred in granting summary judgment. We affirm.

Gaspard worked for American Telco as a district sales manager. While driving to the office after a sales appointment in August 1997, she was involved in a car accident in which she claimed neck and back injuries. She continued to work, although in pain and under the care of a chiropractor, for two months. Then, in October 1997, she was unable to get out of her bathtub without assistance. An MRI revealed two ruptured discs in her back. A doctor advised that she take several weeks off work in order to rest.

Just eleven days later, while at home on medical leave, an American Telco employee who "shared lodgings" with Gaspard came home with bad news. He told Gaspard that she was being fired from her job. He gave her a release, by which she was allowed to resign, receive $4,500, and keep her health insurance for another month in exchange for her waiver of all claims against her employer. If she did not sign the release, she would be terminated without continued benefits or pay. He told Gaspard she had until the next morning to make her decision.

Gaspard signed the release and received the month's insurance and money. Two years later, she brought suit for wrongful termination, alleging the discharge was in retaliation for her having filed a worker’s compensation claim. The trial court granted summary judgment to her former employer based on the release, and Gaspard appeals.

To prevail on a motion for summary judgment, a defendant must establish that no material fact issue exists and that it is entitled to judgment as a matter of law. If a

defendant moves for summary judgment on the basis of an affirmative defense, it has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. In conducting our review of the summary judgment, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor.

In general, a release surrenders legal rights or obligations between the parties to an agreement. A release is a complete bar to any later action based on matters covered by the release. American Telco, who in this case is the party asserting summary judgment on the basis of the release, undertook its burden to prove the elements of its defense as a matter of law by attaching a copy of the release signed by Gaspard to its motion for summary judgment. A signed release contains a strong presumption of enforceability. To presume otherwise would throw into doubt the validity of every settlement and create strong disincentives for parties to settle. Because American Telco has provided presumptive evidence of the release, the burden then shifts to Gaspard to directly attack the release or establish a fact issue in avoidance of it.

Gaspard first attacks the validity of the release by arguing it is ambiguous. The release that Gaspard signed states in pertinent part as follows:

> "I hereby release American Telco from any and all claims, charges, liabilities, causes of action, and demands arising from or in connection with my employment with American Telco or the termination thereof, which I ever had, now have or may have from the day of the commencement of my employment to the date of this waiver and release. This waiver and release includes, without limitations, claims and causes of action arising under federal and state fair employment practice laws as well as the common law of torts and contracts, relating in any way to my employment with American Telco, treatment while employed with American Telco and the termination of my employment. I hereby agree not to bring any lawsuit, charge or claim against American Telco in any court or

> administrative proceeding relating in any way to my employment, my treatment while employed, and the termination of my employment."

This release expressly includes all claims arising from Gaspard's employment or termination from employment with American Telco. Because the release mentions claims arising from termination of employment, we hold that the release unambiguously bars Gaspard's retaliatory discharge claim.

Gaspard also argues that she was under duress when she signed the release. In the early common law, duress *per minas*, i.e., by threats, was available to void a contract where the threat involved imprisonment, mayhem, or loss of life or limb. Through the years, there has been a steady expansion of the duress principle such that direct dire harm is no longer essential, the focus instead being on whether the threat is so overbearing that the victim had no reasonable alternative. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Thus the modern defense of duress, used to avoid enforcement of an agreement, is met by demonstrating the following elements: (1) The promise must be made in response to a threat. Ordinarily it must be the promisee who created or issued the threat, although in some cases a successful showing of duress was made when the threat did not originate with the party seeking to enforce the promise. (2) The threat needs to be severe enough to reasonably convince the will of the promisor to make the promise. If sufficient alternatives to making the promise were available to the promisor, the threat will not be considered severe and duress will not succeed as a defense. (3) The threat must be improper rather than just hard bargaining.

A difficult issue is determining what type of threat is sufficient to invoke the rule. Courts tend to use as a shorthand summary, words such as "wrongful," "oppressive," or "unconscionable" to describe conduct, but the complexity of the term "threat" is demonstrated in Section 176 of the Restatement (Second) of Contracts, which provides:

"(1) A threat is improper if:

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property;

(b) what is threatened is a criminal prosecution;

(c) what is threatened is the use of civil process and the threat is made in bad faith; or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat;

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat; or

(c) what is threatened is otherwise a use of power for illegitimate ends."

In this case, Gaspard's argument is that she faced economic duress. She does not claim that she was physically threatened as a reason to have agreed to the release promise. Gaspard claims in her affidavit "I had no money in the bank and I was in financial straits." Economic duress may be claimed, however, only when the party against whom it is claimed was responsible for claimant's financial distress. None of the summary judgment evidence indicates that American Telco was responsible for Gaspard's economic distress. Accordingly, Gaspard has failed to meet her burden of establishing duress.

We find that American Telco established the requisites of release and there is no ambiguity in the language of the agreement. We have also concluded that the release was not obtained by economic duress. Accordingly, we overrule Gaspard's sole issue and affirm the trial court's judgment.

Peterson v. Zelie Corp.

Columbia Court of Appeal (1979)

Defendant Zelie Corp. (“Zelie”) appeals from a judgment finding it liable for false imprisonment and awarding $10,500 in actual damages and $20,000 in punitive damages to Plaintiff Mary Peterson (“Peterson”).

At the time the incidents leading to the false imprisonment suit took place, Plaintiff Peterson was twenty-three years old and pregnant. Plaintiff went to the Zelie store with instructions from her mother to complete the purchase of items which her mother had placed in the store's layaway department. She was driven to the store by a neighbor, Mike Taylor, and was accompanied by her two sons Tom and Jim, ages 1 and 3 years, and by her 14-year-old brother, Bill. The Plaintiff entered the store, went to the layaway department, and handed the clerk the layaway receipt that her mother had given her. According to Plaintiff Peterson, the clerk handed her, in addition to the items listed on the layaway receipt, a box containing a Chipshot hockey set. This item, as boxed, was approximately as large as the counsel's table in the trial court. Plaintiff accepted this item, she argued, because she did not know exactly what was to be picked up from the store.

Plaintiff Peterson paid the balance due on the items listed on the layaway receipt. She then put all the items except the hockey set in a shopping cart along with her two children. At Plaintiff's direction the hockey set was placed in another cart. Plaintiff's brother, Bill, pushed the cart containing the hockey set toward the store's exit, while Plaintiff propelled the cart containing her children and the balance of the items. As they neared the door Plaintiff found a "Paid” sticker on the floor and placed it on the box containing the hockey set. Plaintiff Peterson claimed Bill, her brother, told her that the sticker had fallen off one of the items she had purchased.

A guard at the store's exit checked each item for a paid sticker and allowed Plaintiff Peterson to pass. However, once outside the door Plaintiff was stopped by a security

guard, whose suspicion was aroused because he had observed Plaintiff place the paid sticker on the hockey set's box. The guard identified himself and asked Plaintiff whether she had paid for the hockey set. Plaintiff claimed she had paid for the item. The guard then asked Plaintiff and her brother to follow him to a room in the back of the store used by the security staff. Once in this room three security officers questioned Plaintiff, at various times.

Initially, Plaintiff Peterson maintained she had purchased the hockey set. However, when Plaintiff was shown the layaway receipt, which did not list the hockey set, she admitted that the hockey set was not one of the items that her mother had previously placed in the store's layaway department. She subsequently filed a suit for false imprisonment which resulted in the judgment from which defendant Zelie appeals.

Defendant Zelie argues that the facts did not warrant the imposition of punitive damages. Under Columbia law, punitive damages are recoverable for false imprisonment when the plaintiff proves, by clear and convincing evidence, that the defendant has been guilty of oppression, fraud, or malice. “Malice" is defined as conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

That the jury found Zelie's detention of Plaintiff Peterson constituted a false imprisonment does not necessarily mean the jury concluded the interview was conducted with the intent to cause harm or was despicable. The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion. Thus, the intent element of false imprisonment does not entail an

intent or motive to cause harm; indeed false imprisonments often appear to arise from initially legitimate motives.

Similarly, even if some force had been used to detain Plaintiff Peterson it would not mean there was sufficient evidence of oppression, fraud, or malice to warrant a trial on the punitive damages issue. In *Beau v. Ketchum* (Columbia Supreme Court, 1953) for example, the plaintiff recovered only nominal damages for being falsely imprisoned, because no actual damages were sustained and there was no evidence of oppression, fraud, or malice. Although the defendants in *Beau* had caused the plaintiff's forcible removal and arrest, the court found that the mere use of force does not constitute evidence of oppression, fraud, or malice where only a reasonable and necessary amount of force was used in the detention.

Under a reading of the facts most generous to Peterson, defendant Zelie cannot be viewed as having been guilty of the oppression, fraud or malice necessary to justify a punitive damage award for the tort of false imprisonment. The facts contain no suggestion of fraud. The facts only mildly hint at malice, and while Zelie did confine Peterson, it was for only a brief period of time sufficient to demonstrate that in fact Peterson had not paid for the hockey game. There are no facts indicating the confinement was intended to cause injury to Peterson or was undertaken by Zelie with a willful and conscious disregard of the rights and safety of Peterson. Similarly, there is no evidence that Zelie subjected Peterson to a cruel and unjust hardship in conscious disregard of Peterson’s rights. Zelie thought Peterson was attempting to steal the hockey game, and in fact Peterson had not paid for the hockey game. We note that since these events occurred, the legislature has enacted a "shopkeeper immunity" statute that provides a shopkeeper with immunity not only from punitive damages but from liability at all when the store detains a customer whom the store has reasonable cause to believe was stealing for a reasonable period of time. Columbia Penal Code §13-1. This statute cannot be applied retroactively, but does suggest a societal indication that the store's detaining, investigating, and ultimately releasing Peterson under the circumstances cannot be said to be despicable. Accordingly, Peterson did

not present clear and convincing evidence of oppression, fraud or malice sufficient to justify a punitive damages award.

Defendant Zelie also argues the trial judge should have granted its motion that judgment for the defendant should be ordered because plaintiff's pleadings and evidence established that plaintiff had released defendant from any liability arising out of plaintiff's detention. Plaintiff Peterson, in response, claims that the release was obtained by duress and it is therefore voidable.

A signed promise by a plaintiff to refrain from suit is entitled to a strong presumption of enforceability. Nevertheless, a plaintiff can avoid summary judgment by demonstrating that there are factual matters to be resolved concerning the existence of the release, the meaning of the release, or the enforceability of the release. For example, if a plaintiff can demonstrate that there are disputed facts concerning whether the release was obtained by overreaching, or was the result of economic duress, or the plaintiff lacked the capacity to enter into the release, the matter cannot be resolved by summary judgment. The parties must go to trial, not on the underlying matter of the lawsuit, but on the issue concerning whether the release is valid and enforceable.

Affirmed in part, reversed in part.

Rafton v. Dorman's Donut House, Inc.

Columbia Court of Appeal (1985)

Plaintiff Nancy Rafton (“Rafton”) appeals from an order of the trial court granting defendant Dorman’s Donut House, Inc.’s (“Dorman’s”) motion for summary judgment. Plaintiff Rafton contends that the trial court erred in entering summary judgment against her because a genuine issue of material fact existed concerning her charge that she was falsely detained and imprisoned. For the reasons that follow, we affirm the trial court's decision.

Plaintiff Rafton’s complaint alleged that she was employed as a clerk in defendant's donut shop in Meyers, Columbia, for approximately three years; that defendant Dorman’s, through its agents and employees, Mac Betts, William Conn, and Joseph Jackson, accused her of selling donuts without registering sales and thereby pocketing defendant Dorman’s monies; and that she was falsely detained and imprisoned against her will in a room located on Dorman’s premises, with force, and without probable and reasonable cause, by defendant Dorman's employees.

Defendant Dorman’s denied the material allegations of Rafton’s complaint and filed an affirmative defense that alleged it was a merchant; that any questioning of Rafton by its employees, Betts, Conn, and Jackson, was performed only after the employees had reasonable grounds to believe that Rafton had committed retail theft while working for defendant Dorman; that any alleged detention for questioning was limited solely to an inquiry as to whether Rafton had failed to account for certain retail sales; and that such inquiry took place in a reasonable manner and for a reasonable length of time. Defendant Dorman’s subsequently moved for summary judgment, arguing that the Plaintiff Rafton's false imprisonment complaint that she was held against her will by her employers in a certain room of a Dorman's Donut House was contradicted by her testimony in a discovery deposition. The transcript of the deposition indicated that Plaintiff

Rafton testified that she had voluntarily complied with Betts, Conn, and Jackson's request to speak privately with her regarding the matter of shortages in her cash register on April 9, 1981, and that when she no longer wished to continue her conversation with her employers, she got up and went home, electing never to return to her job. Rafton's response to Dorman's motion for summary judgment did not contradict the statements that she had made in her discovery deposition.

The trial court entered summary judgment for defendant Dorman's. Plaintiff Rafton appeals from that order.

Plaintiff Rafton asserts that the trial court erred in granting defendant Dorman's motion for summary judgment as there exists a genuine issue of material fact. She posits that she felt compelled to remain in the baking room, where she had gone after Betts and Conn requested they speak privately with her, so that she could protect her reputation by protesting her innocence to the two men, and that she left the room once she began to shake and feel ill. Additionally, she attributes her "serious emotional upset" to her feelings of intimidation that she contends were caused by: William Conn and Joseph Jackson each sitting directly next to her during questioning, yellow pad and pencil in hand; Mac Betts' repeated statement that his briefcase contained proof of her guilt; and his raised voice.

The common law tort of false imprisonment is defined as an unlawful restraint of an individual's personal liberty or freedom of locomotion. Imprisonment has been defined as any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go. In order for a false imprisonment to be present, there must be actual or legal intent to restrain. Unlawful restraint may be effected by words alone, by acts alone, or both; actual force is unnecessary to an action in false imprisonment. The Restatement of Torts specifies ways in which an actor may bring about the confinement required as an element of false imprisonment, including (1) actual or apparent physical barriers; (2) overpowering physical

force, or by submission to physical force; (3) threats of physical force; (4) other duress; and (5) asserted legal authority. Restatement (Second) of Torts §§38-41 (1965). It is essential, however, that the confinement be against the plaintiff's will and, if a person voluntarily consents to the confinement, there can be no false imprisonment. Moral pressure, as where the plaintiff remains with the defendant to clear himself of suspicion of theft, is not enough.

In the case at bar, we are confronted with Plaintiff Rafton's testimony, given under oath, that she voluntarily accompanied Mac Betts and William Conn to the baking room; that she stayed in the room in order to protect her reputation; that she was never threatened with the loss of her job; that she was never in fear of her safety; and that at no time was she prevented from exiting the baking room. Her affidavit, in which she averred that she left the baking room after she began to shake and when she felt that she was becoming ill, does not place into issue material facts which she had previously removed from contention. In her discovery deposition, given under oath, she stated that she "got up and left" when Mac Betts asked her how long the cash register "shorting" had been going on.

In the tort of false imprisonment, it is not enough for Plaintiff Rafton to have felt "compelled" to remain in the baking room in order to protect her reputation, for the evidence must establish a restraint against her will, as where she yields to force, to the threat of force, or the assertion of authority. In the present case, our search of the record reveals no evidence that Plaintiff Rafton yielded to constraint of a threat, express or implied, or to physical force of any kind. Also, absent evidence that Plaintiff Rafton accompanied Betts and Conn against her will, we cannot say that she was imprisoned or unlawfully detained by defendant Dorman's employees.

For the reasons stated above, we conclude that the trial court properly granted defendant Dorman's motion for summary judgment, as there exists no question

of material fact in the present case.

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THURSDAY MORNING
JULY 31, 2008

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

Barry is the publisher of *Auto Designer's Digest,* a magazine that appeals to classic car enthusiasts. For years, Barry has been trying to win a first place award in the annual Columbia Concours d'Elegance ("Concours"), one of the most prestigious auto shows in the country. He was sure that winning such an award would vastly increase the circulation of his magazine and attract lucrative advertising revenues. This year's Concours was scheduled to begin on June 1, with applications for entry to be submitted by May 1.

Sally owned a 1932 Phaeton, one of only two surviving cars of that make and model. The car was in such pristine condition that it stood a very good chance of winning the first place prize.

On April 1, Barry and Sally entered into a valid written contract by which Barry agreed to buy, and Sally agreed to sell, the Phaeton for $200,000 for delivery on May 25. In anticipation of acquiring the Phaeton, Barry completed the application and paid the nonrefundable $5,000 entry fee for the Concours.

On May 10, Sally told Barry that she had just accepted $300,000 in cash for the Phaeton from a wealthy Italian car collector, stating "That's what it's really worth," and added that she would deliver the car to a shipping company for transport to Italy within a week.

1. Can Barry sue Sally before May 25? Discuss.

2. What provisional remedies might Barry seek to prevent Sally from delivering the Phaeton to the shipping company pending resolution of his dispute with Sally, and would the court be likely to grant them? Discuss.

3. Can Barry obtain the Phaeton by specific performance or replevin? Discuss.

4. If Barry decides instead to seek damages for breach of contract, can he recover damages for: (a) the nondelivery of the Phaeton; (b) the loss of the expected increase in circulation and advertising revenues; and (c) the loss of the $5,000 nonrefundable entry fee? Discuss.

Question 5

Ann, Betty, and Celia purchased a 3-bedroom condominium unit in which they resided. Each paid one-third of the purchase price. They took title as "joint tenants, with right of survivorship."

After a dispute, Betty moved out. Ann and Celia then each executed a separate deed by which each conveyed her respective interest in the condominium unit to Ed. Each deed recited that the conveyance was "in fee, reserving a life estate to the grantor." Ann recorded her deed and delivered the original deed to Ed. Celia also recorded her deed and left the original deed with Ann in a sealed envelope with written instructions: "This envelope contains papers that are to be delivered to me on demand or in the event of my death then to be delivered to Ed." Celia recorded the deed solely to protect her life estate interest. Ann, without Celia's knowledge or authorization, mailed a copy of Celia's deed to Ed.

Subsequently, Ann and Celia were killed in a car accident. Betty then moved back into the condominium unit. She rented out one bedroom to a tenant and used the other bedroom to run a computer business. Betty paid all costs of necessary repairs to maintain the unit.

Ed commenced an action against Betty, demanding a share of the rent she has collected. He also demanded that she pay rent for her use of the premises.

Betty cross-complained against Ed, demanding that he contribute for his share of the costs of necessary repairs to maintain the unit.

1. What are the property interests of Betty and Ed, if any, in the condominium unit? Discuss.

2. What relief, if any, may Ed obtain on his claims against Betty for past due rent for her use of the condominium unit and for a share of the rent paid by the tenant? Discuss.

3. What relief, if any, may Betty obtain on her claim against Ed for contribution for the costs of maintaining the condominium unit? Discuss.

Question 6

In 2000, Hal and Wilma, husband and wife, lived in New York, a non-community property state. While living there, Wilma inherited a condominium in New York City and also invested part of her wages in XYZ stock. Wilma held the condominium and the stock in her name alone.

In 2001, Hal and Wilma retired and moved to California.

In 2002, Wilma executed a valid will leaving the XYZ stock to her cousin, Carl, the condominium to her sister, Sis, and the residue of her estate to Museum.

In 2003, Wilma transferred the XYZ stock as a valid gift to herself and to her cousin, Carl, as joint tenants with the right of survivorship. Wilma sold the condominium and placed the proceeds in a bank account in her name alone.

In 2004, Wilma, entirely in her own handwriting, wrote, dated, and signed a document entitled, "Change to My Will," which stated, "I give my XYZ stock to Museum." The document was not signed by any witness.

In 2007, Wilma died, survived by Hal, Carl, and Sis.

What rights, if any, do Hal, Carl, Sis, and Museum have to the XYZ stock and proceeds from the sale of the condominium? Discuss.

Answer according to California law.

THURSDAY AFTERNOON
JULY 31, 2008

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

PEOPLE v. DUNCAN

FILE

PEOPLE v. DUNCAN

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Warren County Prosecutor
Alicia Ouelette, District Attorney
Averil Park, Columbia

MEMORANDUM

To: Applicant

From: Laurie Shanks, Deputy District Attorney

Date: July 31, 2008

Re: **People v. Duncan**

We have indicted Raymond Duncan for the murder of Jennifer Clark. Mr. Duncan confessed to police detectives during an interview at the Averil Park police station. The interview was tape-recorded. We have, of course, turned the recording and transcript of the interview over to defense counsel. Defense counsel has filed a Notice of Motion to Suppress Evidence, seeking to suppress evidence of all statements made during the interview. We will oppose that motion. The defendant has ten days after filing his notice of motion to suppress to file the actual motion and accompanying Memorandum of Points and Authorities. I, however, want you to start work on our reply immediately. Please prepare a draft of a persuasive Memorandum of Points and Authorities that argues the motion should be denied.

Arguments on motions to suppress require a detailed showing of how the facts in the case relate to specific factors identified by the courts in suppression cases. Therefore, your memorandum should relate specific facts to those specific factors and conclude how your analysis would establish that the evidence should not be suppressed. Where appropriate, explain how the defendant's version of

the facts is not credible. Finally, take care to anticipate arguments defense counsel is likely to make and explain why they are not persuasive. Your memorandum should dispense with a statement of facts. I will draft the statement of facts later.

EXCERPTS OF INTERVIEW OF RAYMOND DUNCAN
BY DETECTIVES TIMOTHY JAMES AND GREGORY MANDEL

Detective Timothy James ("James"): Mr. Duncan, it is now 12:25 p.m. on January 2, 2008, and you are here in the Averil Park police station with me, Detective Timothy James, and Detective Gregory Mandel. Is that correct?

Raymond Duncan ("Duncan"): Yes.

James: This interview is being tape-recorded. Is that okay with you?

Duncan: Sure.

James: How old are you, Mr. Duncan?

Duncan: 24.

James: Did you know Jennifer Clark?

Duncan: Yes. I met Jennifer in high school, but I didn't see her after she graduated. Last year, Jennifer and I reconnected through mutual friends.

James: Were you good friends?

Duncan: Sure.

James: How good a friend were you? I mean, did you have a key to her apartment?

Duncan: No. I mean we saw each other occasionally. She allowed me to borrow her car three or four times. I don't have a key to either her apartment or her car.

James: When did you last have contact with Jennifer?

Duncan: It was probably between 10:00 p.m. and 11:00 p.m. on Wednesday, December 20. Jennifer picked me up and left me at her apartment. Jennifer said her rent was due and she had to go somewhere and do something.

James: Were you still at her apartment when she returned?

Duncan: She returned about six hours later, around 4:00 a.m. on December 21.

James: What did the two of you do then?

Duncan: We watched television in the living room. I stayed until maybe 9:00 a.m., when she asked if I wanted to go home because someone was coming over.

James: Who was coming over?

Duncan: She didn't say who it was.

James: Did she drive you home?

Duncan: No. I borrowed her car and left. Jennifer told me to call her in a couple of hours.

James: Did she walk you to the door?

Duncan: Yes.

James: Did she lock the door behind you?

Duncan: She always locked the door. It's not the best neighborhood.

James: Did you see her after that?

Duncan: No.

James: What was Jennifer wearing when you left?

Duncan: She was wearing a short-sleeve, white T-shirt, and light-colored shorts.

James: Did you try calling her like she asked you to?

Duncan: Sure. I drove home in Jennifer's car and took a shower. I called Jennifer's cell and home telephones at least twice between 10:30 a.m. and 12:15 p.m., but there was no answer. Around 1:00 p.m. or 2:00 p.m., I drove to a friend's house and tried to reach Jennifer. Later I went to Pat Kinnikin's house and again tried to reach Jennifer but was unsuccessful. So, Pat and I went to a restaurant later that evening.

James: Did you try to contact her again?

Duncan: Between 6:00 p.m. and 7:00 p.m. we left the restaurant to return Jennifer's car, and Pat followed in his car. We drove to Jennifer's apartment and I parked her car. I hid the key inside the car like the other times I borrowed it.

James: You didn't knock on her door?

Duncan: No. She hadn't been answering the telephone. She did that sometimes. I assumed she wanted to be left alone.

James: When did you find out Jennifer was dead?

Duncan: The next day. I saw it on the news.

James: Mr. Duncan, I'm going to ask you some direct questions and I want you to give me direct answers. And, you need to realize what I'm looking for. I need to establish that what other people told me is credible and I'm also looking to see

how truthful you are with me in our conversations here, okay?

Duncan: Sure.

James: Why didn't you contact the police after you learned she was dead?

Duncan: Look, I don't have a clean record. Besides, my fingerprints were probably everywhere around her apartment and car and I figured the police would contact me. And see, that's what happened. You came to my apartment, left a message. I called you back and agreed to come down to this interview. I don't have anything to hide, but let's be real, I have a record.

James: Did you stab Jennifer?

Duncan: No.

James: Did you mess with any windows in her apartment?

Duncan: No.

James: Were you on the patio or did you use the sliding glass door during your last visit? Would your fingerprints be out on the patio?

Duncan: I didn't use the patio the last time I was there.

James: Are you sure?

Duncan: Uh, I think I'd know, unless I--unless-- unless I just peeked out there. But I wasn't out there for a second or two if I was.

James: That's interesting. I talked to the people who live in the apartment complex, and so you're sure?

Duncan: Well, I could have stepped out on the patio. I may have even stuck my head out and looked. I might have, you know. But, I left out of the front door, and she locked the door behind me, and I went to the car.

James: That's a little more in line with what we're hearing, that you were on that patio. Two people were pretty darn sure you left from the patio.

Duncan: Not true. I left through the front door.

James: Who killed Jennifer?

Duncan: I don't know. I don't have a clue.

Detective Gregory Mandel ("Mandel"): I have to tell you, Mr. Duncan, I still am stuck on why you didn't call the police when you found out what happened.

James: Let's cut to the chase. We've talked to a lot of people and you need to be

honest because we need to put this thing to an end. If you'd like to tell us that?
Duncan: What do you want to know?
James: I want to know what happened with Jennifer.
Duncan: I swear I don't know what happened with Jennifer.
James: Raymond, Raymond. We're past that, dude. We're way past that. You know what I mean? Would you like to tell me what happened? I know this is bugging you, man.
Duncan: I don't know what happened.
James: You know what happened to her. We already know what happened.
Duncan: Okay, what happened then?
James: Ray. There's no doubt in my mind that you did this to her. You know what I'm talking about. Don't put yourself in a position anymore where you have to lie. Okay? We just need to put a closure to this thing. You know what I mean. If there's a reason, there's a reason. But you need to let us know what that reason was.
Duncan: I have no reason for it, because I didn't do it.
James: Ray, Ray.
Duncan: Yes.
James: Take a deep breath. Okay. Tell me what happened.
Mandel: You made mention of the....
James: Hold on a second....
Duncan: Do you mind if I have a glass of water?
James: Sure.
Duncan: Thanks.
James: Ray, you've got to help us here. Tell us what happened. I have to say, what you've told us so far just doesn't fit with the evidence. Not just the witnesses, either.
Mandel: Come on, Ray. Jennifer's family needs to know. You've got to realize this is tearing them apart.
James: We've got physical evidence and witness statements. Now's the time to tell your side of the story.

Duncan: I've told you my side of the story. I wasn't there. Jennifer was my friend. I had no reason to kill her, and I didn't kill her.

Mandel: I have to say, Ray, all our information points to you. Your story doesn't quite add up and you need to clear the air because I understand it was probably not planned.

Duncan: I can't explain what happened because I don't know.

James: Well, I'll tell you how you can explain it, Ray, because when she died you were there. And I can establish that based on your own statements about the times you were there, coupled with scientific facts establishing the time and cause of death.

Duncan: I'm telling the truth. I wasn't there. I didn't do it.

James: There's no doubt in my mind, Ray, you did it, and I can prove it. The problem here is that you, for no reason, other than maybe fear, are painting yourself into a corner. You're putting yourself in a position where you're having to justify the time of death.

Duncan: Not true.

James: Here's what I think, Ray. You were angry with Jennifer because she slept with another guy that night.

Duncan: I don't know about what she did with other guys.

James: We have no doubt what happened. Ray, she was killed by somebody in that apartment that knew her. That apartment told us a lot of stuff, Ray. You go to church, Ray?

Duncan: Yes. Sometimes.

James: You know then, you've got to be forthright with this thing.

Duncan: I have been.

James: You didn't approve of Jennifer's lifestyle, did you?

Duncan: I don't judge people.

James: Let's go back to the time line.

* * * * *

James: But you did go out on the patio, didn't you?

Duncan: Okay. I unlocked the living room's sliding glass door and went to the

patio. But I went back inside and locked the door.

James: See, Ray, this is what I figure. The killer must have been inside the apartment for a while because you had been there, alone, for nine hours on Wednesday evening until Jennifer returned at 4:00 a.m. on Thursday. Jennifer slept on the couch while you watched television until 9:00 a.m. You went out to the patio to look for her car, returned inside and locked the patio door. You said Jennifer locked the front door when you left. Jennifer was killed when she was asleep on the sofa, so how did the killer get inside the apartment with all the doors locked?

Duncan: That's your problem. Maybe someone could have come over after I left with her car.

James: There's no way anyone came over. Look, Ray, this doesn't appear to be a first- degree murder, but it wasn't a random crime. Looks more like a heat of passion kind of thing. And, I have to tell you, everything points to you, Ray, and you know, again, I'm still sitting right here, trying to appeal to you and your sense of fairness.

Duncan: I didn't do it.

James: I'm going to tip my hand on one thing. Okay? I can put you on that patio. I can put you exiting that way. All right? I need you to give me a justification for going out that way instead of going out the front door. Otherwise, your story doesn't hold water.

Mandel: You need to know, Ray, Jennifer's neighbor was always sitting there watching people come and go. Why did you go out the patio and over that fence on the back porch? Why did you leave that way?

Duncan: Didn't I explain to you that I had entered that way, too?

James: Well, Ray, no you didn't. Explain it to us; put the cards on the table for us, man.

Duncan: I jumped over the balcony and I tapped on the window, and I jumped back over because nobody answered. And that was that morning after I had gone to the car. I went back for something. She didn't answer the door. I didn't have the house key. All I had was the car key. And, I knocked and she didn't

answer, and I jumped over the balcony, and then knocked on the glass door, and nobody answered so I jumped back over and I left. I didn't go back into the apartment.

Mandel: Well, the neighbors said something else, so I guess we're still not on the same page. You need some more water?

Duncan: Please.

Mandel: Okay, let me get it for you.... Here, now, let's just sit back and relax for a minute and give this some thought.

Duncan: Can I get a cigarette?

Mandel: We can't smoke in the building, but, hey, let's get some coffee and go sit on the rooftop courtyard for that cigarette. Let me go and check it out.

James: Mandel is a good guy, but more direct than I am. We need to solve this thing.

Duncan: I'll tell you, when I offered to come in for questioning, I felt it wouldn't be too bad, but oh boy!

James: Well, it's a far cry from how it was in the 60's and 70's, where they used to have a bunch of guys yelling at you, threatening and deprivation. Things have changed over the years. You know, we're just doing our job and we won't start yelling at you.

Mandel: I'm back; here's the coffee. You know, I've been thinking about your story about jumping over the balcony and tapping on the window. It doesn't make sense, because Jennifer would have been dead already, and the sliding glass door would have been unlocked. A reasonable person would have tried the door when there was no answer. Did you walk into the apartment when Jennifer was already dead?

Duncan: No. You know what's so bad about this? It's that you guys are saying I did it, and it doesn't matter what I say. Did the neighbors see anyone else at the apartment?

Mandel: We showed your picture at the apartment complex and people have already picked you out. But look, I might be able to understand. Maybe you had to defend yourself if Jennifer's methamphetamine use made her paranoid. You

know, that crank can make you crazy. What happened? She tweaked and went nuts?

James: And, I have to say, your story that you jumped over the balcony, knocked on the window, and left wasn't entirely true.

Duncan: I just have the strong feeling that.... If you guys want it to be me, it's going to be me. I don't know what happened.

Mandel: You might not have meant it to happen; it just might be something ticked you off, something got you upset. But, it happened. I'm aware of that, and the only thing I can say is, man, it's going to torment you, and it's going to bug you, and it's going to cause you untold anguish like it's doing to her family right now. I know it's been bugging you. I could tell when I saw your face when you opened that front door earlier today.

Duncan: I did not do it. Can I have some fresh air, please?

Mandel: Sure. It is now 3:30 p.m. and we are stopping the tape recorder.

* * * * *

Mandel: Okay, it is now 3:50 p.m. We've taken a 20-minute break and in the room are myself, Detective Mandel, Detective James, and Ray Duncan.

James: Need some water?

Duncan: No, I just want to get this over with.

James: I think it's almost over. I want to compliment you on how polite you have been in this interview. If you just opened up, the hard part would be over. We know what happened. Did Jennifer do something to get you upset? Give me something.

Duncan: I didn't do it.

* * * * *

James: Look, Ray, we've been at this for hours. We know you did it. We know it. I told you that scene spoke volumes. And it wasn't the scene of a cold-blooded killer. It wasn't that kind of a crazed scene.

Mandel: We're way beyond you not having anything to do with her death. We can place you at the crime scene at the time that she was killed. We have witness statements placing you there. On top of that, you finally have admitted to

jumping over that balcony on that patio.

Duncan: I was at the apartment but she wasn't dead and I didn't stab her. I didn't leave through the sliding glass door. I just jumped over the balcony and tapped the glass.

James: There were only two possibilities: either you killed her or you went back into the apartment and saw her dead.

Duncan: Yes. Okay, but I don't know what happened. I entered her apartment through the sliding glass door and saw her lying on the couch. Jennifer was covered by a blanket, she was lying on her stomach and facing the cushions, her right hand was by her face, and there was a bunch of blood. I didn't see any wounds but the blood was just like soaked into the couch. I didn't touch anything. I left through the patio, closed the sliding glass door, and drove Jennifer's car back to my place.

Mandel: When was this?

Duncan: Between 8:30 a.m. and 9:00 a.m. on Thursday, December 21.

Mandel: Did you really spend Wednesday night at her apartment?

Duncan: I spent the night on Wednesday, and left around 4:00 a.m. on Thursday. I walked out through the front door. I took Jennifer's car, drove to my place, and then went to a friend's house. I returned to Jennifer's apartment between 8:30 a.m. and 9:00 a.m. Jennifer didn't answer and the front door was locked, so I entered through the sliding glass door. I left through the sliding glass door and jumped over the patio balcony. I used Jennifer's car to leave.

Mandel: Did you tell anyone what you saw?

Duncan: No.

James: Why did you call Jennifer's house later that day, even though you knew she was dead?

Duncan: So the police wouldn't suspect me.

Mandel: Why would we suspect you?

Duncan: I was the only one that was there around that time, and I knew that, like I told you before, that I had touched everything.

Mandel: Let's take a break. It's currently 5:15 p.m. and we are turning off the

tape recorder.

* * * * *

James: Okay, we are back from our break. It is 5:35 p.m. and Detective Mandel, Raymond Duncan, and I, Detective James, are back in the interview room. Okay, let's finish this up. You killed your friend. Why?

Duncan: Look, I've got a question.

Mandel: Go ahead, ask.

Duncan: I halfway know the answer already. Are you guys going to go ahead and process me, or what are you going to do with me? I appreciate the fact that you guys have been patient with me. What are you guys going to do? I mean, are you guys going to process me, or what? I don't want to go to jail. I didn't stab her. But if you guys are going to process me and say that I did, why don't you just go ahead and do it?

James: What would you like us to book you for?

Duncan: I don't know. 'Cause you guys say I did this murder.

James: Well, I'll tell you what we've done. I think what we've established at this point, Ray, is that you saw your friend in her apartment, stabbed, okay, because you at least established that.

Mandel: You need to get this off your chest. Did you use crank with Jennifer on Wednesday night?

Duncan: We had been smoking crank. Listen, guys, I'm getting scared now.

James: Do you still want to talk to us? To tell us about the crank?

Duncan: Sure, I'll talk. I used a substantial amount of crank with Jennifer that night.

James: What were you thinking, Ray, when you were using the crank?

Duncan: I don't know, man. All of the drugs – I don't know.

James: Was it the crank, Ray? Is that what made you do it?

Duncan: Look, okay, Jennifer was arguing with me when it happened.

James: Were you trying to have sex with her, Ray? Were you trying to rape her?

Duncan: No.

James: But you stabbed her, didn't you Ray?

Duncan: Okay, okay. I don't remember stabbing her, but we argued.

James: Tell us what you remember, Ray.

Duncan: We were near the couch and I stood up. I remember us arguing. I remember standing up, and I remember seeing a knife with blood and then leaving. I left through the sliding glass door to throw off the police. I drove away in Jennifer's car and threw away the knife in a trash can.

James: Where'd you get the knife?

Duncan: I probably got the knife from the kitchen counter.

James: Why 30 times, man? She had to be screaming.

Duncan: No, no. All she did was ask what I was going to do, but she didn't scream.

James: Why 30 times?

Duncan: It was more than once, but not 30 times.

James: I think it's time we read you your rights, Ray. Now, Ray, you have the right to remain silent. Anything you say can and will be used against you in court. You have the right to the presence of a lawyer. If you can't afford a lawyer, one will be provided at no cost. Do you understand these rights, Ray?

Mandel: Ray, you are under arrest for the murder of Jennifer Clark. We may as well turn off the tape recorder. It's 6:03 p.m.

END OF TRANSCRIPT

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia	)	
	)	Criminal Division
v.	)	2008-2341
	)	
Raymond Duncan	)	
	)	

NOTICE OF MOTION TO SUPPRESS EVIDENCE

PLEASE TAKE NOTICE that upon the annexed affidavit of Raymond Duncan, defendant, and upon all the previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 1435 Elm Street, Averil Park, Columbia, on August 7, 2008, at 9:00 a.m. or as soon thereafter as counsel can be heard, for an order:

1. Suppressing evidence of all statements made by defendant to the police during an interview conducted on January 2, 2008, as obtained in violation of *Miranda v. Arizona*; and

2. For such other and further relief as to the Court may deem just and proper.

Dated: July 30, 2008

Mary Lynch

Mary Lynch
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia	)	
	)	Criminal Division
v.	)	2008-2341
	)	
Raymond Duncan	)	
_____	)	

DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

I, Raymond Duncan, being duly sworn, state:

1. I am the defendant in the above-entitled action.

2. At approximately 12:30 p.m. on January 2, 2008, I was arrested and taken into custody at the Averil Park Police Station by Detectives Timothy James and Gregory Mandel ("James" and "Mandel," respectively).

3. Detectives James and Mandel never attempted to question me at my home.

4. Detectives James and Mandel never told me I could have refused to go to the police station.

5. Once I arrived at the police station, Detective James or Mandel never told me I could leave.

6. I was placed in a small interrogation room that unlocked only from the outside.

7. I spent five hours being questioned by the two detectives.

8. Detective James accompanied me on two cigarette breaks and never left me alone.

9. Detectives James and Mandel repeatedly accused me of killing Jennifer Clark.

10. Detectives James and Mandel communicated their subjective belief

that I was the killer and made it objectively reasonable for me to believe I was not going to leave the police station.

11. During the course of this interrogation one or both of the detectives informed me repeatedly that it was to my advantage to cooperate with them.

12. During the course of the interrogation I was told of several items of evidence, including eyewitnesses and forensic evidence, which allegedly constituted evidence against me, and was told by my interrogators that it was useless for me to deny my guilt in the face of such evidence.

13. Finally, after a total of approximately six hours of interrogation I was placed in handcuffs, left alone in the locked interrogation room for approximately one hour and then transported to the city jail.

14. It was after more than five hours of interrogation that I was advised that anything I said might be used in evidence against me, that I was not required to make a statement, that I had a right to the assistance of counsel, or that if I could not afford counsel, one would be appointed for me without charge.

Raymond Duncan

Raymond Duncan

Subscribed and sworn to before me on July 30, 2008.

Guido Zanani

Notary Public

TRANSCRIPT OF INTERVIEW OF DETECTIVE TIMOTHY JAMES

BY LAURIE SHANKS

Laurie Shanks ("Shanks"): Thank you for coming in, Detective James. As I said on the phone, Ray Duncan's attorney has requested a hearing seeking to exclude the statements her client made to you during your interrogation. We need to prepare for hearing. You're obviously likely to be called, so I wanted to go through your version of the interview. I have reviewed the transcript, but I have a few questions.

Timothy James ("James"): Fine.

Shanks: I'll be tape-recording this so I can refer to it for that preparation. First, how did Duncan come to be at the police station?

James: Well, the fact is he came down on his own.

Shanks: Did he just show up at the station?

James: No. We had been out to his apartment a couple of times and he wasn't there. We called a couple of times and left messages. And, apparently knowing we were looking for him, he called me and left a message saying when he would be home. Detective Mandel and I went out to his apartment and he invited us in. About the time we told him we were investigating Jennifer's death, we got a call from a crime scene and had to leave. He told us he would wait.

Shanks: When was this?

James: About 11:00 a.m., January 2. The call turned out to be nothing, so we went back to the apartment. We got there about 11:30, maybe 11:45.

Shanks: Then what happened?

James: Again, we told him we were investigating Jennifer's death and that he was one of several people we wanted to talk to because her cell phone indicated she had talked to him the day she was murdered. We asked if we could talk to him at his place, but he suggested that it would be better for him if we met him at the police station.

Shanks: Did he indicate why he'd rather be at the police station?

James: Not really. I just assumed he might be concerned about the neighbors, or maybe he didn't want the police there if someone stopped by.

Shanks: So what did you do?

James: He said he didn't have a car and asked if we would give him a lift, so we drove him down to the station.

Shanks: What kind of car were you in?

James: An unmarked sedan.

Shanks: Where did he sit on the ride to the station?

James: The front seat.

Shanks: Was he handcuffed?

James: No.

Shanks: What were you guys wearing?

James: No uniforms. We were both in business suits.

Shanks: Did either of you ever display your guns?

James: No.

Shanks: During the drive to the police station, what did you talk about?

James: Small talk mostly, but I did advise him that he was going to a voluntary interview and he was free to leave at any time.

Shanks: When did you arrive at the station?

James: About noon. I got a phone call just as we arrived at the station, so we had him sit there in the reception area for about half an hour.

Shanks: When you interviewed Duncan, was he a suspect in Jennifer's death?

James: He was a subject, like everyone we had talked to.

Shanks: Did you say suspect or subject?

James: He was a subject. He was not suspected of doing anything wrong. We wanted to determine if he had any helpful information about the case.

Shanks: Why did you and Detective Mandel not advise Duncan of his *Miranda* rights at the beginning of the interview?

James: Like I said, he was not a suspect, he had not been linked to the murder, there were no independent witnesses, and there was no evidence he had been at the scene. The evidence was developed from Duncan himself during the interview.

Shanks: Did it become apparent to you during the interview that he was being

caught in inconsistencies in what he was telling you happened on the day Jennifer was killed?

James: As you can see from the transcript, it became evident that there were several inconsistent statements he was making during the interview.

Shanks: At any time did he ask to leave?

James: After he was inside the interview room, he could have told us he was going to leave and walked out of the police department without talking to anyone. The complete interview lasted about five hours, but he never asked to leave.

Shanks: Was the interview room locked?

James: No, the room doesn't lock. We interview all kinds of people in there. There's no real need to lock the room. If a person was in custody, he'd either be in handcuffs, or there are these rings bolted in the floor and we would chain him to the rings.

Shanks: Tell me about the breaks you took.

James: He asked for water and it was provided for him. We took two cigarette breaks during the interview. The first break occurred when Duncan asked for a cigarette and some fresh air. There is no smoking in the police department building, so we decided to take a break outside and we went up on the roof, which is the building's designated smoking area for employees. It's got a gazebo.

Shanks: Did Duncan have any cigarettes?

James: No. We got one from another officer.

Shanks: Did you stay with him during the break?

James: Yes.

Shanks: Why did you stay with him?

James: No real reason other than the fact that I was just out there. I had given him the cigarette and, you know, I knew he didn't know the way to the smoking area. Also, there are some security concerns. You don't want the general public wandering around the station. Doesn't happen often, but you can imagine what would happen if someone under arrest got violent and someone just happened to walk by and got injured.

Shanks: What did you talk about during the break?

James: Nothing much. He asked if he was under arrest and I repeatedly told him that he was not under arrest and that he was free to leave.

Shanks: Did Duncan ever ask to leave?

James: He never asked to leave and he never tried to leave.

Shanks: Was he handcuffed while on the break?

James: He was not handcuffed or restrained in any way on the trip to or from the roof.

Shanks: You took a second cigarette break later. Was he handcuffed then?

James: No.

Shanks: Did you go with him to the roof?

James: Yes.

Shanks: How long was that break?

James: Like the first, maybe 20 minutes – the length of the time it took to walk and get the cigarette and allow him to smoke the cigarette. We didn't rush the breaks.

Shanks: And, at any time during the breaks, did he tell you that he wanted to leave?

James: No.

Shanks: Did he ask if he could leave?

James: He never made that request.

Shanks: What did you say when he finished his cigarette? I mean, did you say, "Are you ready to go back now?" Or do you recall what you would say in that regard?

James: Well, right before we actually walked out of the gazebo we would ask, "Are you ready to go back and talk some more?"

Shanks: And what did he answer you?

James: I don't recall the specific answer, but I know that the response was affirmative.

Shanks: Now, you interviewed other people as part of your investigation. Were they questioned in the same manner as Duncan? Did you confront other individuals with the accusation that you knew they killed the victim?

James: I interviewed three others before I talked to Duncan. I asked each of them whether they killed Jennifer and if they had anything to do with her murder. These three were also subjects rather than suspects.

Shanks: Did any of these other three interviews last five hours?

James: No, but one might have been for three hours. In fact, I think it was Brandy Gentry. I conducted an interview at the police department that lasted several hours. She made obscene remarks during the interview, and I became more aggressive and accused her of killing Jennifer. She was interviewed in the same room, and she got up, said the interview was over, and left the police station.

Shanks: Was Duncan ever left alone at any point in the interview?

James: No.

Shanks: Could someone have entered the police station and walked to the second floor interview room without interference by any officers?

James: Sure, a person could walk into the station and take the elevator to the second floor, and go to the interview room without being stopped. But, witnesses or suspects are usually accompanied by an officer to protect the integrity of the department's internal security.

Shanks: After Duncan was placed in the interview room, if he had decided to leave, could he have said, “Excuse me, gentlemen, I think I'm going to leave now?”

James: Yes.

Shanks: You know that technique you used with Duncan where you and Detective Mandel told him repeatedly that you knew he committed the crime, you had the evidence to prove it, and you just want to know why, and when he denied doing it you repeated the accusations? Did you use that technique with Gentry or any other person?

James: Yes. I specifically asked Gentry if she committed the crime and accused her of lying, but I never told her there was no doubt in my mind that she killed Jennifer.

Shanks: So, to be clear, was Duncan physically restrained in any way prior to

his arrest?

James: He was arrested at 6:03 p.m., when the interview concluded, and he was handcuffed and chained to the bolt in the floor. Up to that point he was not restrained.

Shanks: Thank you, Detective. I think that will do for now.

THURSDAY AFTERNOON
JULY 31, 2008

California
Bar
Examination

Performance Test B

LIBRARY

PEOPLE v. DUNCAN

LIBRARY

State of Oregon v. Mathiason

United States Supreme Court (1977)

Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State's case. At trial he moved to suppress the confession as the fruit of questioning by the police was not preceded by the warnings required in *Miranda v. Arizona* (U.S. S.Ct., 1966). The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Supreme Court reversed the conviction. It found that although Mathiason had not been arrested or otherwise formally detained, the interrogation occurred in a coercive environment of the sort to which *Miranda* was intended to apply. We think that the Oregon court has read *Miranda* too broadly, and we therefore reverse its judgment.

The facts are straightforward. An officer of the Oregon State Police investigated a theft at a residence near Pendleton. The officer asked the lady of the house which had been burglarized if she suspected anyone. She replied that Mathiason was the only one she could think of. Mathiason was a parolee and a “close associate” of her son. The officer tried to contact Mathiason on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at Mathiason's apartment with a note asking him to call because he’d like to discuss something with him. The next afternoon Mathiason did call. The officer asked where it would be convenient to meet. Mathiason had no preference, so the officer asked if Mathiason could meet him at the State Police patrol office in about an hour and a half, about 5:00 p.m. The patrol office was about two blocks from Mathiason's apartment. The building housed several state agencies.

The officer met Mathiason in the hallway, shook hands and took him into an

office. Mathiason was told he was not under arrest. The door was closed. The two sat facing each other across a desk. The police radio in another room could be heard. The officer told Mathiason he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised him that the police believed Mathiason was involved in the burglary and (falsely stated that) Mathiason's fingerprints were found at the scene. Mathiason sat for a few minutes and then said he had taken the property. This occurred within five minutes after Mathiason had come to the office. The officer then advised Mathiason of his *Miranda* rights and took a taped confession.

At the end of the taped conversation the officer told Mathiason he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p.m. when Mathiason left the office.

The Oregon Supreme Court reasoned from these facts that the interrogation took place in a "coercive environment." The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed Mathiason he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and Mathiason was a parolee under supervision. We are of the opinion that this evidence is overcome by the evidence that Mathiason came to the office in response to a request and was told he was not under arrest.

Our decision in *Miranda* sets forth rules of police procedure applicable to custodial interrogation. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Subsequently we have found the *Miranda* principle applicable to questioning that takes place in a prison setting during a suspect's term of imprisonment on a separate offense,

Mathis v. United States (U.S. S.Ct., 1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. *Orozco v. Texas* (U.S. S.Ct., 1969).

In the present case, however, there is no indication that the questioning took place in a context where Mathiason's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview, Mathiason did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody or otherwise deprived of his freedom of action in any significant way.

Such a noncustodial situation does not become one where *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning occurred in a coercive environment. Any interview of one suspected of a crime by police will have coercive aspects to it, simply by virtue of the fact that the policeman is part of a law enforcement system that may ultimately cause the suspect to be charged with a crime. But the police are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Oregon Supreme Court to be another circumstance contributing to the coercive environment that makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether Mathiason was in custody for purposes of the

Miranda rule.

The judgment of the Oregon Supreme Court is reversed.

United States v. Cray

United States Court of Appeals, 15th Circuit (2004)

The government appeals from an order of the district court suppressing a written statement that Dr. Michael Cray, a chiropractor, signed at the conclusion of an interview with FBI agents. The district court determined that the statement should be suppressed because it was the product of custodial interrogation that was conducted without informing Cray of his rights under *Miranda v. Arizona* (U.S. S.Ct., 1966). We respectfully disagree, and we reverse.

FBI agents Timothy Bisswurm and Sean Boylan went to Cray's home the morning of February 16, 2001, to interview him regarding a health care fraud investigation. Prior to their arrival, the agents called Cray at 4:30 a.m. to ensure that Cray was home, stating they had the wrong number. At 6:30 a.m., the agents approached the home. When Cray did not answer the door, Agent Boylan called Cray by telephone and told him that he needed to come to the front door. When Cray appeared, Boylan identified himself and Bisswurm as FBI agents and told Cray they would like to speak with him for a few minutes. Boylan further informed Cray that he did not have to speak with the agents.

Cray admitted the agents into his home, and the three men proceeded to the living room to discuss the investigation. Over the course of the ensuing interview, which lasted nearly seven hours, Cray was informed several times that his participation was voluntary, and that he was free to ask the agents to leave his home. About three hours into the interview, Cray told the agents that he was late for work. The agents instructed Cray to call in sick, and directed him not to inform his office about the investigation. Cray complied.

Although the telephone rang several times as the interview progressed, the agents instructed Cray not to answer, and Cray did not do so. When Cray moved about his home on two occasions to go to the bathroom and his bedroom, Boylan

accompanied him to check the rooms for telephones. During the interview, Cray was told that if he did not cooperate, the agents would interview his 75-year-old father and others. The agents further told Cray that they would “light up his world,” and also suggested that if he did not cooperate, then they could use the power of the FBI to pressure insurance companies to withhold payments to his business.

Cray did not resist the agents' questioning during the interview, and he never asked them to leave. At the conclusion of the meeting, Cray signed a written statement (after making one correction and initialing each page) acknowledging that “no one has threatened, coerced, or promised me anything.” The written statement contained admissions that Cray had knowingly caused insurance companies to reimburse at least one hundred false claims, and knowingly paid illegal fees to persons who referred new patients to Cray's chiropractic clinic. There was no threat of arrest during the encounter, and the agents never displayed weapons. Cray was not arrested until weeks later.

Cray was charged in a twenty-seven count indictment with various crimes relating to an alleged health care billing fraud scheme. He brought a motion to suppress his signed statement.

The ultimate question in determining whether a person is in “custody” for purposes of *Miranda* is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The only relevant inquiry in considering that question is how a reasonable person in Cray's position would have understood his situation. In making that evaluation, we consider the totality of the circumstances that confronted the defendant at the time of questioning.

Courts have identified at least eight factors for consideration in making the custody determination: (1) whether the suspect was informed during the interview

that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether the person's conduct indicated an awareness of such freedom; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect voluntarily acquiesced to official questioning or initiated contact with authorities; (4) whether strong-arm tactics were used, *e.g.*, the police manifested a belief that the person was culpable and they had evidence to prove it, the police were aggressive, confrontational or threatening; (5) whether there was a police-dominated atmosphere, *e.g.*, where the interview took place or how many police officers participated; (6) whether the suspect was placed under arrest at the termination of the questioning; (7) whether the express purpose of the interview was to question the person as a witness or a suspect; and (8) how long the interrogation lasted. *United States v. Jones* (15th Cir. 1995).

The most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will. The FBI agents who interviewed Cray testified they informed Cray at least eight times that his participation in the interview was voluntary, and that he was free to ask the agents to leave his home.

We believe that this abundant advice of freedom to terminate the encounter should not be treated merely as one equal factor in a multi-factor balancing test designed to discern whether a reasonable person would have understood himself to be in custody. That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court, or this court, or any case from another court of appeals that can be located, holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

The weighty inference that Cray was not in custody after receiving such advice is strengthened further by the context in which the interview occurred – the living room of Cray's home. When a person is questioned on his own turf, the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation. Indeed, an interrogation in familiar surroundings such as one's home softens the hard aspects of police interrogation and moderates a suspect's sense of being held in custody. The custodial surroundings are important to consider. The principal psychological factor of concern is isolating the suspect in unfamiliar surroundings for no purpose other than to subjugate the individual to the will of his examiner.

Although these nonexhaustive factors and their attendant balancing test are often cited in our decisions concerning *Miranda*, there is no requirement that they be followed ritualistically in every *Miranda* case. When the factors are invoked, it is important to recall that they are not by any means exclusive, and that “custody” cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Exploring the nuances of such vague factors as voluntary acquiescence, strong-arm tactics, and a police-dominated atmosphere in order to place them on one side or the other of a balancing scale may tend one to lose sight of the forest for the trees. The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest.

The district court relied heavily on its finding that the FBI agents instructed Cray not to alert others by telephone of the FBI's presence during the interview, and escorted Cray to his bedroom and bathroom to check for telephones before Cray entered the rooms. There are two difficulties with this emphasis on telephones. The first is precedent. In *United States v. Sutera* (15th Cir. 1999), officers conducted a three and one-half hour search of Sutera's apartment, and then interviewed him for one hour. They prevented him from using his phone during the search, and then questioned him in isolation in his apartment. We rejected

Sutera's contention that prohibition on use of the telephone was one of several factors that demonstrated custody.

The second difficulty presumably explains the precedent: That a suspect is discouraged from using a telephone in his home during an interview often is not probative of whether he is free to terminate the interview altogether. In this case, the FBI agents testified that they requested (or, as the district court found, “directed”) Cray not to use the telephone to disclose the presence of FBI agents, because such disclosure would interfere with Cray's ability to cooperate with an ongoing investigation. If his cooperation with the FBI were known by alleged coconspirators, then he could not assist the government (and potentially himself) through undercover telephone calls or recorded meetings with other suspects. This likely is a common request (or direction) from investigators who are soliciting cooperation.

We also conclude that Cray's lack of voluntary acquiescence in questioning does not tend to show that he was in custody. The district court thought the mere absence of resistance by Cray, such as his making no attempt to terminate the interview and allowing the interview to proceed to its closing, did not rise to the level of active cooperation that our court has found to constitute voluntary acquiescence as used in our third factor. We conclude that the initiation of questioning by FBI agents in this case is not significant evidence of restraint on Cray's freedom of movement. Against a backdrop of repeated advice that he was free to terminate the interview, Cray's decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest.

Judgment reversed.

People v. Adams
Columbia Supreme Court (1996)

Defendant Joseph Adams appeals from a judgment entered after a jury convicted him of involuntary manslaughter. Defendant claims his statements to police were involuntary and obtained in violation of the *Miranda* rule. *Miranda v. Arizona* (U.S. S.Ct., 1966). We agree and conclude that their admission at trial compels reversal.

Officer Cindy Torres testified that she and her partner Officer Mike Sterner learned from Jessie Badillo that defendant was "involved" in a shooting death by a group of “gang bangers” at Washington School on January 27. They went to defendant's residence and asked him and his mother if he would talk to them at the police station about the homicide. They offered to bring him back home. Defendant and his mother agreed that he would go. Defendant's mother also consented to a search of her house for evidence of the homicide and gang involvement.

The officers brought defendant to an interview room at the police station. Although he was not physically restrained, Officer Torres did not recall whether defendant ever left the room. The interview lasted two hours, and, when it was over, the officers drove defendant back home. Officer Torres told defendant he was not in custody. However, she then said they would bring him home when they were finished, explaining that "[i]t really depends on how long you want to take and how quickly you tell us the truth." Torres later testified that what she meant was if defendant told the truth in one hour or two hours, the interview would take that long. She further explained, "There's a possibility that he would never tell us the truth; then we would give him a ride home without him telling us the truth." However, Torres admitted she did not tell this to defendant.

Officer Torres next informed defendant they knew what had happened at

Washington School, who had been present, and who had done what. Officer Sterner said they just wanted to know how he got involved. Defendant denied being involved. He said that, after school, he declined an invitation to join a group of people and instead walked home with Richard Badillo. The officers rejected this story, and accused him of fabricating an alibi with Badillo. They told him not to "play games" and confronted him repeatedly with incriminating evidence of his involvement with "gang bangers." They falsely suggested they had his fingerprints from one of the cars.

Defendant continued to deny involvement. The officers became exasperated and annoyed and assailed him for hiding behind lies and not taking responsibility for his conduct. They warned that his lies would not protect him and that while the truth might exculpate him, his lies plus the evidence they had would probably lead to murder charges and his being labeled a liar. Defendant nevertheless refused to admit involvement. The officers pressed on. They said other officers were with his mother, and she would not corroborate his story. They said his story might be an effort to conceal complicity in the murder. They asked him to think about family events (his sister's marriage) and personal opportunities (going to college) that he would miss if sent to prison. They said he owed the victim the real story and invoked his mother's guidance to tell the truth.

After a while, the officers decided to leave defendant alone for a while. Before leaving, they advised him to clear his conscience and not to waste any more of his or their time. When the interview resumed, defendant stuck to his story. The officers again said he was lying and continued to pressure him to tell the truth. They warned that "[l]ying isn't gonna get you anything, nothing good. It'll sink you, but it ain't gonna save you." Torres advised him that "[i]f you tell us a lie and we know it's a lie, then that story is what's gonna get tacked onto you, and I can't protect you from that. Nobody can protect you from that."

After further pressuring, defendant partially abandoned his story. Asked if he

intended to kill anyone while driving around, defendant said "No." Sterner expressed disbelief, asserted that was the purpose. "That was stated clear and upfront." Defendant denied he intended to get involved if there was fighting and said he thought the group was out looking for girls. Sterner said others had given this story, but he did not believe it. Defendant then said he just wanted to cruise around with the group but soon realized they were out to "gang bang." He denied seeing a gun but admitted hearing someone mention that somebody else had a gun and that it was "no good."

Defendant then said that after the group left a restaurant, he left them to go with a girl he had seen. Sterner responded, "You know how this is gonna work. You're gonna tell us some girl's name. We're not gonna let you leave here until we go talk to the girl, and she's not gonna be able to confirm the story, Joe." He then pressed defendant to tell him about the incident at Washington School. At that point, defendant dropped all resistance and explained what happened that day.

In *Miranda v. Arizona* (U.S. S.Ct., 1966), the United States Supreme Court held that a person questioned by the police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Statements obtained in violation of this rule cannot be used to establish guilt.

It is settled that the *Miranda* advisements are required only when a person is subjected to custodial interrogation. Custodial means any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Interrogation refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.

It is beyond reasonable dispute that defendant's interview was reasonably likely to elicit incriminating responses and thus was interrogation within the meaning of the *Miranda* rule. The People do not claim otherwise. The primary issue is whether defendant was taken into custody or otherwise deprived of his freedom of action in any significant way.

To make this determination, a trial court must first establish the circumstances surrounding the interrogation. It must then measure these circumstances against an objective, legal standard: Would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest?

Courts have identified a variety of relevant circumstances to consider in deciding whether an interrogation was in a custodial environment. *United States v. Jones* (15th Cir. 1995). No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest.

Here, defendant agreed to an interview at the station, and Officer Torres initially said defendant was not in custody. However, we find it significant that Torres then explained that the interview would end and they would bring him home after he told them the truth. Given the officers' repeated rejection of defendant's story, a reasonable person eventually would have realized that telling the "truth" meant admitting the officers' information was correct and explaining how and why one was involved and that until this "truth" came out, he or she could not leave. The officers later expressly reinforced this implication by explicitly telling defendant he would not be allowed to leave if they had to go interview an alleged alibi witness.

Next, we note that Officers Torres and Sterner did not tell defendant he was free to terminate the interview and leave if he wished. Furthermore, defendant's

conduct here does not indicate he was aware of his personal rights during the interrogation. Indeed, it does not appear that defendant ever left the interview room, and Torres could not recall whether defendant ever did. Nor does it appear defendant had a means of getting home on his own if he had tried to leave before the officers were finished with him.

We observe that the officers did not interview defendant only as a potential witness. The officers unmistakably informed defendant he was a potential suspect and repeatedly told him they had evidence to prove his involvement. The People candidly concede that defendant was made aware "that the police officers fully suspected the worst possible scenario regarding his involvement in the crime."

Concerning the manner of interrogation, this court has consistently held that accusatory questioning is more likely to communicate to a reasonable person in the position of the suspect that he is not free to leave than would general and neutral investigative questions. Thus, on the issue of custody, courts consider highly significant whether the questioning was brief, polite, and courteous, or lengthy, aggressive, confrontational, threatening, and intimidating.

The "tag team" interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how defendant's interrogation might have differed had he been under arrest.

Given the totality of circumstances, we conclude that at least by the time defendant partially abandoned his story, if not before, the environment during the interrogation had become coercive, and a reasonable person would have understood he or she was required to remain for questioning indefinitely at the

sole discretion of the officers and was not free to leave until he or she satisfied the officers' demand for the truth.

Thus, a reasonable person would have felt deprived of liberty in a significant way and that the restraint was tantamount to being under arrest. Here the interview was a typical custodial interrogation, during which the suspect feels completely at the mercy of the police and frequently is prolonged, and in which the suspect is aware that questioning will continue until he provides his interrogators the answers they seek.

The judgment is reversed.